STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Abbeville County

Honorable Frank R. Addy, Jr., Circuit Court Judge

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THE STATE,

APPELLANT,

V.

RI'SHON KELTARIAN GILLIAM,

RESPONDENT

APPELLATE CASE NO. 2024-001400

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# INITIAL BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**South Carolina Cases**

**United States Cases**

**Other Jurisdictions**



**Statutes**

**Other Authorities**



**Regulations**



**Constitutional Provisions**

## APPELLANT'S STATEMENT OF THE ISSUE

S.C. Code § 24-13-40 provides that defendants are entitled to credit for time served in pretrial incarceration, except when a defendant "commits a subsequent crime while out on bond." Gilliam pleaded guilty, but the trial court refused to consider evidence that Gilliam committed subsequent crimes while out on bond because Gilliam had not been convicted of those charges. Was it error for the trial court to give credit for time served without making this determination?

## COUNTER STATEMENT OF THE ISSUE

Whether the plea court correctly determined that the phrase "commits . . . a crime" means "convicted" of a crime, when "the cornerstone of our judicial system" is the presumption of innocence?

## COUNTER STATEMENT OF THE CASE

On May 12, 2023, Respondent was arrested for trafficking in methamphetamine, a gun charge, and another drug charge[1] alleged to have been committed on May 12, 2023. Tr. 7, l. 15 – 8, l. 8. On May 19, 2023, Respondent was arrested for burglary, conspiracy, and grand larceny, for actions allegedly committed on May 11, 2023. Tr. 6, l. 15 – 7, l. 14. Respondent was incarcerated for nearly a year, 342 days, on those charges before eventually posting bond. Tr. 14, l. 25 – 15, l. 3. On June 19, 2024, Respondent was arrested for "a trafficking meth charge" for which he was denied bond. Tr. 8, ll. 8-20. He remained incarcerated from the date of that arrest until the day of his plea. Tr. 8, ll. 21-22. It does not appear from the record that the state moved to revoke Respondent's bond.

On July 18, 2024, Respondent pleaded guilty to the May 12, 2023, trafficking and gun charges and the May 19, 2023, conspiracy charge. Tr. 1. The state dismissed all other charges as part of the guilty plea. R.* (plea court order). The Honorable Frank R. Addy, Jr. presided over the plea hearing. Tr. 1. Jane H. Merrill represented Respondent. Tr. 1. Micah E. Black represented the state. Tr. 1. Judge Addy, pursuant to a negotiated plea agreement, sentenced Respondent to fourteen (14) years' imprisonment for trafficking, and five (5) years each for conspiracy and the gun charge, all to run concurrently. Tr. 23, ll. 13-17.

During the plea hearing, Ms. Merrill argued that the statute denying time-served credit did not apply. Tr. 21, ll. 3-9. Respondent argued at the plea hearing that "commits" is best read as "convicted of," because he is presumed innocent. Tr. 14, l. 19 – 15, l. 13; 21, ll. 4-9. The state responded that the plain language of the statute did not require a conviction. Tr. 21, l. 22 – 22, l. 4. When asked by the plea court, the state asserted its position was that a person who is

[1] While not stated in the record, it appears this other drug charge was for some sort of marijuana possession. Tr. 7-8.

"arrested for another offense," even if that offense were "disorderly conduct," would not be entitled to credit for time served. Tr. 21, l. 22 – 22, l. 4.

The plea court ultimately agreed with Respondent's arguments and credited him for 342 days' time served. Tr. 24, ll. 4 – 25, l. 4; R* (Sentencing sheet). The state objected to the ruling "under section 24-13-40, subsection 3." Tr. 25, ll. 5-8, 11-12 (cleaned up). On July 25 and 29, 2024, the state filed a motion (and amended motion) for reconsideration. R.* (motion and amended motion). In the operative motion, the state asserted that the standard for determining whether Respondent had "committed" a crime was the same as the standard used by the courts for determining whether a probationer had violated probation. R.* (Amended motion for reconsideration). It then requested, for the first time, that the plea court hold an evidentiary hearing to hear proffer evidence from a police investigator regarding the dismissed charges. R.* (Amended motion for reconsideration).

In a written order, the plea court denied the motion for reconsideration. R* (Order). In that order, the plea court found that an "inmate's entitlement to credit for pretrial detention is a matter of statutory creation and not a matter of right." R* (Order, at 2).[2] Turning to the issue of statutory interpretation, the plea court stated that the word "commits," as used in the statute, must mean "convicted of." R.* (Order). Specifically, it concluded:

> ***The*** cornerstone of our judicial system is that an individual is presumed innocent of any charge brought against him until such time as he is convicted. Clearly, some measure of ambiguity is present in the statute. In the temporal sense, an individual *commits* a crime the very instant that crime is accomplished or completed, regardless of whether a charge is even brought or a final conviction is ever obtained. However, under the law, criminal liability obviously does not attach to one who *commits* a crime until such time as they are convicted. If the presumption of innocence is to

[2] Respondent disagrees with this conclusion. *See infra*, § III.

> have any meaning, that is what it must mean. Thankfully, however, it is unnecessary for this Court to engage in a metaphysical exercise and ascribe a temporal adverb to the term "commits." To do so would constitute judicial rewriting of the statute in issue.

R.*(Order, at 2) (all emphasis in original).

The state timely appealed. R* (Notice of Appeal). Specifically, the state appealed the plea court's award of "342 days of jail time despite [Respondent] being arrested again while out on bond." R* (Notice of Appeal).

## STANDARD OF REVIEW

This Court reviews questions of statutory interpretation *de novo*. *State v. Alexander*, 424 S.C. 270, 274-75, 818 S.E.2d 455, 457 (2018).

## ARGUMENT

Because "the cornerstone of our judicial system" is the presumption of innocence, the plea court correctly determined that the phrase "commits…a crime" means "convicted" of a crime.

The state asserts that the plea court erred by "rel[ying] on the presumption of innocence." BOA at 9. Because the plea court applied foundational and uncontroversial principals of criminal law to find the statute ambiguous and construed it strictly in Respondent's favor, the order must be affirmed.

S.C. Code Ann. § 24-13-40(3) (hereinafter the "Statute") was part of the 2023 Bond Reform law passed by the General Assembly and signed by Governor McMaster on June 20, 2023. *Bond Reform*, S.C. Acts No. 83, § 8 (2023). Prior to the passage of this act, there were only two exceptions to the general rule that all persons must be given full credit for time served: (1) the prisoner who was incarcerated pre-trial was an escapee; and (2) the prisoner was serving a sentence for one offense while awaiting trial on another. S.C. Code Ann. § 24-13-40 (West 2013). The Bond Reform law added two new exceptions: the one at issue here, and another that denies time-served credit for any person whose bond was revoked. S.C. Code Ann. § 24-13-40(3, 4) (current). South Carolina appears to be the only state with a similar sentencing regime. *See* Kimberly Ferzan, *The Trouble with Time Served*, 48 B.Y.U. L. Rev. 2001, 2005-06 & n.11 (2023) (collecting statutes).

This Court should affirm the plea court for three reasons. First, this Court should affirm without reaching the merits. The state dismissed all charges against Respondent that would have qualified as subsequent crimes under the Statute. Thus, it is barred from raising the issue now.

Second, the plea court's interpretation of the Statute is correct, as a matter of law. Finally, under the state's proposed interpretation, the Statute is unconstitutional.

## I. The State's Arguments are Barred

First, this Court need not reach the merits of the state's arguments because the state is barred from raising the alleged error for two reasons. First, the state is collaterally estopped from complaining about the natural consequences of that action. Second, the state's core issue is not preserved for appellate review. For these reasons, this Court may affirm without reaching the merits.

### *a. The state is collaterally estopped from raising its arguments*

First, this Court need not reach the merits of the state's arguments because the state is barred from raising the alleged error. Despite the state's contention that the plea court erred by awarding Respondent 342 days of credit pursuant to § 24-13-40(3), the state dismissed Respondent's charges that, by its own argument, served to satisfy the commission of "a subsequent offense while out on bond." BOA 5-9; Tr. 25, ll. 5-9, 11-12; S.C. Code Ann. § 24-13-40(3). In effect, the state's own request to dismiss Respondent's subsequent charges underlies the alleged error it raises on appeal. Therefore, even if the court erred by awarding Respondent 342 days of time-served credit, the plea court did so, in part, because it determined that the subsequent charges were dismissed as part of the plea agreement, which was a direct result of the state's voluntary action. Tr. 24, ll. 18-23; *see State v. Quillien*, 263 S.C. 87, 96, 207 S.E.2d 814, 818 (1974) (citing *State v. Chasteen*, 242 S.C. 198, 130 S.E.2d 473 (1963) (explaining that "[e]ven if there were error, it was invited by counsel for Appellant, leaving Appellant in no position to complain.").

Further, the state is collaterally estopped from raising the plea court's award of time-served credit on appeal because it dismissed all the charges that could have qualified as subsequent offenses committed while out on bond. *See State v. Snowdon*, 371 S.C. 331, 334, 638 S.E.2d 91, 93 (Ct. App. 2006) (explaining that collateral estoppel can be used in a criminal proceeding and "prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action."); *see also State v. Hewins*, 409 S.C. 93, 107, 760 S.E.2d 814, 821 (2014) (recognizing that "collateral estoppel in the criminal context is derived from the Fifth Amendment Double Jeopardy Clause."). The state's dismissal of Respondent's subsequent charges functioned as an agreement that those charges were void, and thus, to allow the state to renege on its agreement by challenging the court's ultimate award of time-served credit on appeal is inapposite. *See, e.g.*, *Carter v. State*, 337 S.C. 17, 18, 522 S.E.2d 342, 343 (1999) (stating that "[w]here the State consents to the dismissal of a PCR application after the statute of limitations has run and agrees that the petitioner should be allowed to refile the application, the State is estopped from asserting the statute of limitations as a defense to a subsequent PCR application."). In addition, because the state necessarily litigated the issue of Respondent's commission of the subsequent charges by dismissing those charges, it cannot now ask this Court to relitigate the issue. *See Mackey v. State*, 357 S.C. 666, 668, 595 S.E.2d 241, 242 (2004) (holding that "all proceedings following an entry of a *nolle prosequi* are void because the indictment is no longer valid.").

Accordingly, the state is barred from challenging the plea court's award of time-served credit due to its own action of requesting dismissal of Respondent's subsequent charges in the plea court.

### *b. The state's argument suggesting a hearing to "prove" the commission of the subsequent offense is not preserved for appellate review.*

Second, to the extent the state asserts that the proper procedure for determining whether Respondent committed the "subsequent crime" is a preponderance bench proceeding, it made this argument to the plea court for the first time in a motion to reconsider. R.* (Amended motion for reconsideration). Thus, the argument is not preserved for appellate review.

"It is settled that '[a]n issue may not be raised for the first time in a motion to reconsider.'" *Repko v. Georgetown Cnty.*, 424 S.C. 494, 502, 818 S.E.2d 743, 748 (2018) (quoting *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009)). When an issue is not properly presented to the lower court, this Court will not reverse the lower court based on that issue. *Id.* at 503, 818 S.E.2d at 748 ("An appellate court may not reverse a lower court order based on a legal or factual premise not advanced by the party who lost at the trial court level."). Our Supreme Court has repeatedly reaffirmed the "long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues an arguments." *Id.* (quoting *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). While an appellate court may *affirm* for any reason appearing in the record, it "may not, of course, *reverse* for any reason appearing in the record." *Id.* at 504, 818 S.E.2d at 748 (emphasis in original) (quoting *I'On*, 338 S.C. at 421-22, 526 S.E.2d at 724).

Here, the plea court at the plea hearing ordered Respondent credited for his time spent in pre-trial detention. Tr. 24, ll. 4 – 25, l. 4; R* (Sentencing sheet). The state did not object to that ruling, other than to say it was objecting "under section 24-13-40, subsection 3." Tr. 25, ll. 5-8, 11-12 (cleaned up). Then, for the first time in a motion to reconsider, the state proposed to the plea court that it should conduct a bench proceeding to determine whether Respondent had

committed the subsequent offense by a preponderance of evidence. R* (Amended motion to reconsider). This is not the same argument that it made at the hearing nor is it a logical continuation of that argument. If the legal basis for this preponderance hearing could be deduced from the language of the Statute, perhaps the state's argument may be preserved. However, for the reasons discussed *infra*, the state's proposed hearing is not based on the text of the Statute at all. Therefore, it is not sufficient for the state to merely say it is "objecting under [the Statute]." Because the crux of the state's argument was raised for the first time in a motion to reconsider, its argument to this Court is not preserved for this Court's review. *Repko*, 424 S.C. at 502, 818 S.E.2d at 748.

**II. The State's Interpretation of the Statute is Incorrect, as a Matter of Law.**

The state's proposed interpretation of the Statute is erroneous for two reasons. First, the phrase "commits," in the criminal context, must mean "convicted of." Well-established principles of criminal law command that the Statute be read in that fashion, and in any event, the Statute is ambiguous. Second, to the extent it seeks to use the Statute to deny time-served credit which was accumulated *before* the subsequent arrest, this is contrary to the intent of the General Assembly. For these reasons, the plea court's order should be affirmed.

To reiterate, the Statute provides, in relevant part, "credit for time served prior to trial and sentencing shall not be given . . . when the prisoner commits a subsequent crime while out on bond." S.C. Code Ann. § 24-13-40(3). When interpreting a statute, its terms must be construed in context "and their meaning determined by looking at the other terms used in the statute." *Hinton v. S.C. Dept. of Probation, Parole, and Pardon Svs.*, 357 S.C. 327, 333, 592 S.E.2d 335, 338 (Ct. App. 2004). A word and its meaning should be construed in conjunction with the purpose of the entire statute and the policy behind the law. *Whitner v. State*, 328 S.C. 1, 6, 492

S.E.2d 777, 779 (1997). Sections of a statute that are part of the same legislative scheme must be construed together and each given effect, if that can be done by any reasonable construction. *Higgins v. State*, 307 S.C. 446, 449, 415 S.E.2d 779, 801 (1992).

When a statute is "complete, plain, and unambiguous, legislative intent must be determined from the language of the statute itself." *Whitner*, 328 S.C. at 6, 492 S.E.2d at 779. "Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation." *Hinton*, 357 S.C. at 333, 592 S.E.2d at 338 (citing, *inter alia*, *Rowe v. Hyatt*, 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996)). However, when a statute is ambiguous, the court may look elsewhere, beyond the plain text of the law for clues as to legislative intent. *Id.* at 334, 592 S.E.2d at 338. "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Id.* (citing *City of Sumter Police Dept. v. One (1) 1992 Blue Mazda Truck*, 330 S.C. 371, 375, 498 S.E.2d 894, 896 (Ct. App. 1998)). And statutes that are penal in nature must be "strictly construed against the state and any doubt must be resolved in favor of the defendant . . .." *State v. Germany*, 216 S.C. 182, 188, 57 S.E.2d 165, 168 (1949).

***a. "Commits" must mean "convicted of."***

First, the plea court found that "commits," as that word is used in the Statute, must mean "convicted of." R* (Order, at 2). According to the plea court, "criminal liability obviously does not attach to one who commits a crime until such time as they are convicted. If the presumption of innocence is to have any meaning, that is what it must mean." R* (Order, at 2 (emphasis deleted)). The plea court also "clearly" found that "some measure of ambiguity is present in the [S]tatute." R* (Order, at 2). It also appeared to operate under the well-established principle that

ambiguities in penal statutes must be resolved in the defendant's favor. R* (Order, at 2 (citing, *inter alia*, *State v. DeAngelis*, 257 S.C. 44, 183 S.E.2d 906 (1971)).

When "construing a criminal statute, we are guided by the rule of lenity—the principle that any ambiguity must be resolved in favor of the accused." *Berry v. State*, 381 S.C. 630, 633, 675 S.E.2d 425, 426 (2009); *see also State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) ("[W]hen a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant."). This rule applies to sentencing as well. *DeAngelis*, 257 S.C. at 50, 183 S.E.2d at 909 (explaining that "[a]mbiguity or doubts relative to a sentence should be resolved in favor of the accused.")

The state challenges the plea court's finding that "commits" must mean "convicted of" in two ways. First, the state asserts that the Statute is unambiguous. BOA at 6. Second, after it appeared at the plea hearing unprepared to address Respondent's arguments and did not get its way, the state proposed that this Court should create, from whole cloth, a new procedure for determining whether a subsequent crime has been committed: a bench proceeding where the state would prove the offense by a preponderance of evidence. BOA at 7. According to the state, the plea court's "reliance on the presumption of innocence was misplaced," and "requiring proof of a conviction in order to show the defendant 'committed' another crime while out on bond would effectively require the state to hold a separate trial in order to properly sentence a defendant for the offense for which he has been convicted." BOA at 9. The state calls the idea that it should have to try people for crimes they have been arrested for an "absurd result." BOA at 9. The state's arguments are misguided.

The Statute provides that time-served credit shall be denied "when the prisoner commits a subsequent crime while out on bond." S.C. Code Ann. § 24-13-40(3). The state ignores the

fact that when a person is alleged to have committed a crime, the law presumes them innocent until they moment they are convicted. This concept has existed for nearly four thousand years.[3] Moreover, the "General Assembly is presumed to be aware of the common law." *State v. Bridgers*, 329 S.C. 11, 14, 495 S.E.2d 196, 197-98 (1997). And "where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense." *Id.* "If the presumption of innocence is to have any meaning, that is what it must mean." R* (order, at 2 (emphasis deleted)).

Each of the state's counterarguments are unavailing.

*First*, the state asserts that the existence of another portion of the Bond Reform Act, the new offense of commission of a violent offense while under bond order for a previous violent crime, demonstrates that the General Assembly intentionally omitted the words "convicted" from the statute. BOA at 7. The statute establishing the criminal offense cited by the state reads:

> It is unlawful for a person to commit a violent crime while under a bond order or other pretrial release order for a previous violent crime. If the person is convicted of the subsequent violent crime, and is thereafter convicted of a violation of this section, the person is guilty of a felony and must be imprisoned not more than five years.

S.C. Code Ann. § 17-15-270. The state asserts that the use of both "commit" and "convicted" in the same statute, but in different contexts, shows that the General Assembly intended for these words to be interpreted to mean different things. BOA at 7. However, this ignores the full text. Rather, what this section provides is that a person is guilty of a separate crime if they are: (1) out

[3] Francois Quintard-Morenas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 AM. J. COMPARATIVE L. 107, 110 (2010) (the legal principal that an accuser bears the burden to prove the guilt of the accused was included in the Code of Hammurabi, which was created sometime between 1792 and 1750 B.C.).

on bond for a violent crime; (2) commit a subsequent crime; and (3) are thereafter *convicted of both crimes*. *See* S.C. Code Ann. § 17-15-270.

The state asserts that "commission of a crime and the defendant's later being convicted of that crime are two distinct elements with different meanings (and different consequences) under the statutory scheme." BOA at 7 (internal quotation marks omitted). While it is true that temporally the "commission" of a crime and the later conviction for that crime may occur at separate points in time, it is not necessarily true that the two have different meanings or different consequences. For instance, § 17-15-270 does not permit punishment unless a defendant is *convicted* of *both* crimes.

The offense of commission of a violent offense while under bond order for a previous violent crime is not committed by merely committing a subsequent crime while out on bond for another offense. It is committed if, and *only* if, the state proves beyond a reasonable doubt that a defendant committed the first offense, proves beyond a reasonable doubt that he was on bond for that offense, and then proves beyond a reasonable doubt that he committed a subsequent offense.[4]

Further, several other criminal statutes do not use the "commits, convicted of" language, and there can be no argument that those statutes represent intent by the General Assembly to provide for summary punishment without conviction. *See, e.g.,* S.C. Code Ann. § 16-3-653 ("A

[4] It must also be noted that the penalty for this offense is a maximum term of imprisonment of five years. S.C. Code Ann. § 17-15-270. And the only way to commit the offense is to commit two entirely separate violent offenses. *Id.* It would be quite illogical if the General Assembly intended to deny someone several years of time-served credit for pre-trial detention because of a subsequent arrest for *any* crime—including something so minor as "disorderly conduct" Tr. 21, l. 22 – 22, l. 4—but provide an absolute maximum punishment of five years' imprisonment when a convicted violent criminal is convicted of a second, unrelated violent crime.

person is guilty of criminal sexual conduct in the second degree if [elements] . . . Criminal sexual conduct in the second degree is a felony punishable by . . ..").

*Second*, citing *State v. Miller*, 122 S.C. 468, 115 S.E. 742 (1923), the state points out that a preponderance standard—or something like it—is used in probation revocation hearings to determine whether a suspended sentence should be activated. These situations are inapposite.

To start, "probation is a matter of *grace*." *State v. Allen*, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006) (emphasis added (quoting *State v. White*, 218 S.C. 130, 135, 61 S.E.2d 754, 756 (1950)). A person who commits a crime has no constitutional or even statutory right to a sentence of probation, and no criminal statute provides for probation as the only lawful sentence. A probation revocation can be accomplished by a lower standard of proof, because the probationer is already being given a benefit to which he is not entitled. In contrast, a defendant has both a statutory, S.C. Code Ann. § 24-13-40(3), and constitutional right, *see infra*, § III, to their time-served credit. Further, a person cannot be placed on probation unless they have already been *convicted* of the offense for which they are on probation. A person need only be arrested to be under bond order.

Further, the state proposes an entirely new procedure for determining whether a crime has been "committed." The General Assembly provided for no such proceeding in the Statute at issue, despite expressly doing so in the two circumstances that the state asserts are directly analogous: probation revocation hearings and bond revocation hearings. *See, e.g.*, S.C. Code Ann. § 24-21-460 (probation revocation hearings); *id.* § 17-15-55 (bond revocation hearings).[5]

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[5] The state simultaneously argues that the Statute is unambiguous and that this Court should read an entirely new hearing requirement into the Statute. That argument is self-defeating. "When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language . . .." *Hodges v. Rainey*, 341 S.C. 79, 87, 553 S.E.2d 578, 582 (2000). Even if the General Assembly had intended such a hearing—an

The absence of such language in the Statute here is dispositive evidence that the General Assembly did not intend for this Court to read such a requirement into the Statute. *See Bessinger v. R-N-M Builders & Associates, LLC*, 421 S.C. 349, 358, 806 S.E.2d 731, 736 (Ct. App. 2017) ("What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." (internal quotations and citation omitted)). It is also good evidence that the General Assembly intended the word "commits" to mean "convicted of." The General Assembly did not provide for any procedure to determine when a person "commits" a crime, nor did it attempt to define that term. This is most likely because the General Assembly intended "commits a crime" to be read in the same way it is always read: as "convicted" of a crime.

*Third*, and finally, the state asserts that the plea court's ruling "would effectively require the state to hold a separate trial in order to properly sentence a defendant for the offense for which he has been convicted." BOA at 9. According to the state, this result would be "absurd." BOA at 9. A court must reject a potential interpretation of a statute if it "leads to an absurd result that could *not possibly have been intended* by the legislature or that defeats plain legislative intent." *State v. Taylor*, 436 S.C. 28, 34, 870 S.E.2d 168, 171 (2022) (emphasis added). "Absurdity," therefore, is a very high bar, where only the most egregious contortions of a statute will be rejected for that reason. A reading which requires the state to convict people of crimes at trial, rather than at a summary bench proceeding based on nothing but the fact of an arrest, is far from absurd. On the contrary, it would be an absurd reading of the Statute to read it to require a defendant to lose potentially years of time-served credit because of an arrest for "disorderly conduct," an offense for which the General Assembly provided a maximum

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unlikely proposition, given that the General Assembly did not write that into the Statute—this fact would not make the state's position legally sound. "While it is true that the purpose of an enactment will prevail over the literal import of the statute, *this does not mean that this Court can completely rewrite a plain statute.*" *Id.* (emphasis added).

punishment of thirty days' imprisonment or a $100 fine. S.C. Code Ann. § 16-17-530(A) (defining disorderly conduct); Tr. 21, l. 22 – 22, l. 4 (solicitor asserted that the Statute requires a loss of time-served credit for *any* subsequent arrest, even if it is for "disorderly conduct").

For one, in this case, *the state* decided to dismiss Respondent's 2024 charges. Only the state can enter a *nolle prosequi* on an indictment, and if it wanted to seek Respondent's conviction of both the 2023 and 2024 charges, it did not have to dismiss the subsequent charges.[6] The state exercises a great deal of control over plea dealing, which is the result of more than nine out of every ten criminal cases.[7] Even in those rare cases where a criminal defendant will demand trials on two separate counts, nothing in the Statute prevents the Department of Corrections from retroactively altering the release dates of prisoners convicted of subsequent offenses. In fact, there are currently numerous processes for revoking, for example, good time credit that function similarly.[8]

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[6] The effect of the state entering a *nolle prosequi* on Respondent's 2024 charges is that those charges, as a matter of law, must now be treated "as if they never existed." *Mackey*, 357 S.C. at 668, 595 S.E.2d at 242 (adopting "a specific, bright-lined rule that (1) establishes that a *nolle prosequi* upon charges extinguishes the state's prosecution upon those charges; (2) treats charges *nol prossed as if they never existed*; and (3) requires a court to dismiss charges when a solicitor has *nol prossed* the charges and failed to re-indict a criminal defendant upon those charges (emphasis added)); *but see In re Treatment and Care of Oxner*, 440 S.C. 5, 10 & n.5, 889 S.E.2d 586, 589 & n.5 (2023) (distinguishing *Mackey* on other grounds, in the context of the Sexually Violent Predator Act). Although the state is typically permitted to refile *nol prossed* charges, this case involves a negotiated guilty plea. Part of the negotiations were the dismissal of other charges. If the state attempted to bring those charges back, they would be in violation of the plea agreement, since Respondent has detrimentally relied upon it by pleading guilty. *See Reed v. Becka*, 333 S.C. 676, 688, 511 S.E.2d 396, 403 (Ct. App. 1999).

[7] *See Missouri v. Frye*, 566 U.S. 134, 143 (2012) (citing Bureau of Justice Statistics for the proposition that 94% of state criminal cases end in guilty pleas).

[8] *See generally, e.g.,* S.C. Code Ann. § 24-13-210; S.C. Dept. of Corr., Policy and Procedure No. OP-21.11 (May 1, 2004).

Therefore, it is difficult to see how a statutory scheme requiring the state to prove criminal acts at trial—as it must in every other criminal case and has been required to since South Carolina was a colony of England—could ever be an "absurd" result. Accordingly, the plea court's order correctly interpreted the Statute and must be affirmed.

Finally, if the Statute cannot be interpreted as Respondent urges, the next reasonable conclusion is that the Statute is ambiguous. Strictly construing the Statute in Respondent's favor requires affirmance of the plea court's order, because it adopted the only reasonable interpretation of the Statute that was strictly construed against the state and preserves any argument against its viability under the state and federal constitutions.

A statute is ambiguous if it can be reasonably interpreted in more than one way. *S.C. Dept. of Social Svs. v. Lisa C.*, 380 S.C. 406, 416, 669 S.E.2d 647, 652 (Ct. App. 2008). When a statute is ambiguous, and the statute is penal, the rule of lenity requires "any doubt about [the] statute's scope be resolved in the defendant's favor." *State v. Miles*, 421 S.C. 154, 164, 805 S.E.2d 204, 210 (Ct. App. 2017). In this case, the plea court interpreted the Statute in one way, and the state interprets it the other. It does not matter which interpretation is "correct;" because the plea court ruled for the defense, it matters only if the plea court's interpretation is *reasonable*. *See Lisa C.*, 380 S.C. at 416, 669 S.E.2d at 652.

Because the plea court relied on well-established principles of criminal law, its interpretation of the Statute is reasonable. Accordingly, its order must be affirmed.

***b. If anything, the Statute can only be interpreted to deny time-served credit accumulated after a subsequent arrest, not before.***

Second, the state's position is that Respondent's time-served credit accumulated before his 2024 arrests must be revoked. Tr. 25, ll. 508, 11-12; R* (Notice of appeal); R* (Amended motion for reconsideration). However, the state's interpretation is not evident from the text of

the Statute. The Statute does not identify what time-served credit must be denied if an individual commits a subsequent crime while out on bond; specifically, it does not identify whether the time accumulated before the subsequent arrest, after the subsequent arrest, or the entirety of the time spent incarcerated prior to trial or sentencing must be denied. And, in any event, for the same reasons as discussed *supra*, the Statute is ambiguous and must be construed strictly in Respondent's favor.

Nonetheless, to construe the Statute in context, *see Whitner*, 328 S.C. at 6, 492 S.E.2d at 779, the Court must look to the entire statutory scheme, not just the statutory provision at issue here. In its entirety, the code section where the statutory provision at issue in this case reads:

> The computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the imposition of the sentence. However, when (a) a prisoner shall have given notice of intention to appeal, (b) the commencement of the service of the sentence follows the revocation of probation, or (c) the court shall have designated a specific time for the commencement of the service of the sentence, the computation of the time served must be calculated from the date of the commencement of the service of the sentence. In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing, and may be given for any time spent under monitored house arrest. Provided, however, that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense; (3) when the prisoner commits a subsequent crime while out on bond; or (4) has bond revoked on any charge prior to trial or plea.

S.C. Code Ann. § 24-13-40.

Considering the entire statutory scheme, three of the four exceptions to the general rule that full time-served credit must be awarded operate in a similar fashion. Essentially, if a defendant should be incarcerated anyway, he is not entitled to credit. An escapee is supposed to be in the jail he escaped from, a defendant serving time on another sentence is supposed to be in jail serving that sentence, and a defendant whose bond is revoked has shown he cannot obey the conditions of bond and should be incarcerated. *See id.* § 40(1)-(2), (4). All of these provisions share a common denominator: they are forward-looking. Thus, it would be contrary to well-established rules of statutory interpretation to read the fourth exception to operate in the opposite fashion. *See Higgins*, 307 S.C. at 449, 415 S.E.2d at 801 (sections of a statute that are part of the same legislative scheme must be construed together and each given effect, if that can be done by any reasonable construction).

In the instant case, Respondent was incarcerated for 342 days for his 2023 offenses prior to bonding out. R* (Order, at 1); BOA at 2. He was re-arrested for the 2024 charges on June 19, 2024, and pleaded guilty on July 18, 2024, thus spending an additional thirty days incarcerated after the subsequent offense. BOA at 2. It is not consistent with the statutory scheme to retroactively revoke Respondent's 342 days of time-served credit prior to his posting of bond and prior to the alleged commission of a subsequent crime while out on bond.[9] The state is only entitled to a denial of time-served credit *after* Respondent "committed" the subsequent crime, if at all. The state has already received this relief.

For these reasons, the Statute must only, if anything, be read to *deny* time-served credit, not to *revoke* it. Thus, this Court should affirm the plea court's order.

[9] Further, doing so would be unconstitutional for the reasons discussed *infra*.

**III. If the State's Interpretation is Correct, the Statute is Unconstitutional.**

Finally, if the state is correct, and the Statute has the effect of denying time-served credit if a person is re-arrested, without regard to the nature or severity of either offense or whether the person is convicted after the subsequent arrest, then the Statute is unconstitutional and cannot be enforced against Respondent. The Statute, if this Court accepts the state's interpretation, is unconstitutional for several reasons. First, even if there is no constitutional right to time-served credit, the denial of that credit conditions the right to a jury trial on a person spending a greater amount of time incarcerated. Second, the Statute violates the Due Process Clause. Third, allowing judicial fact-finding alone to determine whether a person actually committed a subsequent crime violates the Sixth Amendment Jury Clause as interpreted by the Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

At the outset, the denial of credit for time served solely due to the commission of a crime while on bond is punishment. The sole purpose for denying this credit is to punish disfavored defendants. The constitutional analysis must proceed in that light. *See State v. Kimbrough*, 212 S.C. 348, 358, 46 S.E.2d 273, 277 (1948) ("A just sentence is imperative and must not be denied."). Consider, for example, a sentence of time served. The mere existence of a time-served sentence necessarily implies that pre-trial detention is, at least in certain circumstances, punitive. Otherwise, every defendant sentenced to time served for an offense, which occurs several times per day in this state's criminal courts, has not been "punished" for the offense they pleaded guilty to. Moreover, by granting credit in most cases, the Statute itself recognizes that pre-sentence incarceration is sufficiently equivalent to post-sentence incarceration as to justify a day-for-day credit on the sentence in satisfaction of the penological goals of punishment. *See Owens v. Stirling*, 443 S.C. 246, 268, 904 S.E.2d 580, 591 (2024) (noting the "three purposes of

punishment . . . (1) reform or rehabilitation, (2) general deterrence, and (3) specific deterrence" (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *11-12)). As discussed *infra*, the General Assembly's goals in passing the Statute were to protect the community or discourage the commission of crimes by those already out on bond. *See Signing Statement, infra* n. 14. Therefore, the Statute was specifically enacted, at the least, for the purposes of "deterrence," which constitute two of the "three purposes of punishment." *Owens*, 443 S.C. at 268, 904 S.E.2d at 591 (citing 4 BLACKSTONE, *supra*).

Regardless of any claimed goals for the denial of time-served credit, the result is inherently punitive. Denying credit for time served is punishment because incarceration is punishment regardless of when the conviction occurs. *See Anglin v. State*, 525 P.2d 34, 36 (Nev. 1974) ("Presentence detention is behind-bars confinement. Legal categories do not remove the punitive aspects of the rigors and restraints of detention.").[10]

Notably, both the state and the plea court cite *State v. Sanders*, 251 S.C. 431, 163 S.E.2d 220 (1968), for the proposition that there is no constitutional right to time-served credit. However, *Sanders* does not stand for that proposition.

In *Sanders*, a defendant was sentenced to the maximum statutory term of imprisonment, and was not given credit for time served. *Id.* at 445, 163 S.E.2d at 228. On appeal to our Supreme Court, the defendant asserted that the failure to award time-served credit when a

[10] *See also Durkin v. Davis*, 538 F.2d 1037, 1041 (4th Cir. 1976) ("[P]retrial detention is nothing less than punishment." (alteration original) (citation omitted)); *Jackson v. State*, 209 P.3d 897, 900 (Wyo. 2009) ("We find no merit in the argument sometimes advanced that presentence jail time should not be credited because it is not 'punishment.' Whatever it may be called, it is certainly a deprivation of liberty, which, in itself, is punishment to most human beings." (quoting *Smith v. State*, 508 S.W.2d 54, 57 (Ark. 1974))); *id.* ("Put simply, a day in jail is a day in jail . . .").

maximum sentence was imposed constituted cruel and unusual punishment. *Id.*[11] The Supreme Court held that there was no statute requiring the trial court to award such credit, "and in the absence of such statute, the rule *appears to be* that a prisoner is not entitled as a matter of right to credit for his presentence jail time." *Id.* at 445-46, 163 S.E.2d at 228 (emphasis added (citing 24B C.J.S. *Criminal Law* § 1995(5)). The Court then continued to hold that the pre-trial detention was not part of the sentence, and therefore, the sentence itself could not have been cruel and unusual punishment. *Id.* at 446, 163 S.E.2d at 228.[12]

While *Sanders* may stand for the proposition that failing to award time-served credit is not unconstitutional under the Eighth Amendment, it decides nothing else. The section of the opinion that the state is likely to point to is: "the rule appears to be that a prisoner is not entitled as a matter of right to credit for his presentence jail time." *Id.* at 445-46, 163 S.E.2d at 228. This sentence is *dicta*. It was not necessary for the *Sanders* Court to decide anything other than whether the Eighth Amendment prohibited denial of time-served credit, nor did it. For these reasons, *Sanders* does not control the analysis here.

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[11] The *Sanders* opinion does not state whether the argument was made under the Eighth Amendment or the South Carolina Constitution.

[12] It is worth mentioning that *Sanders* was decided at a very different time. At the time *Sanders* was decided, it appears that no state awarded credit for time spent in pre-trial incarceration. *See generally,* National Conf. on Bail and Crim. J., *Bail in the United States: 1964* (May 27-29, 1964). At the same time, however, all, or almost all states and the federal government afforded those charged with crimes an *absolute* right to bail in non-capital cases. *Id.* at 2 (citing, *inter alia*, *Judiciary Act of 1789*, 1 Stat. 73, 91 (1789)). And, at the time, "American judges, unlike their English counterparts, [were] not authorized to use pretrial bail as a device to protect society from possible new crimes by the accused." *Id.* at 5; *compare Stack v. Boyle*, 342 U.S. 1 (1951), *with United States v. Salerno*, 481 U.S. 739 (1987). The combination of these factors means that the "general rule" that was non-authoritatively announced in *Sanders* craves a second look by this Court.

***a. The Statute violates the unconstitutional conditions doctrine.***

"[T]he government may not deny a benefit to a person because he exercises a constitutional right." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983)). For example, a public university violates a professor's freedom of speech by refusing to renew his contract for speaking against the university. *Perry v. Sindermann*, 408 U.S. 593 (1972). And a county government violates the right to travel by only extending healthcare benefits to "those indigent sick who had been residents of the county for at least one year." *Koontz*, 570 U.S. at 604 (citing *Memorial Hosp. v. Maricopa Cnty.*, 415 U.S. 250 (1974)). The general purpose of the "unconstitutional conditions doctrine" is to "vindicate the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Id.* Simply, even if the Constitution does not grant a "right" to a specific government benefit, the government cannot deprive a person of that benefit "on a basis that infringes on his constitutionally protected interests." *Perry*, 408 U.S. at 597. Because permitting the government to do so would permit "the government to produce a result which it could not command directly." *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). Therefore, "even if the government may withhold [a] benefit altogether," it may not grant a benefit "on the condition that the beneficiary surrender a constitutional right." *See, e.g.*, *State v. Nguyen*, 285 Kan. 418, 427, 172 P.3d 1165, 1173 (2007).

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .." U.S. Const. amend. VI. "The right of trial by jury shall be preserved inviolate." S.C. Const. art. I, § 14. The right to a trial by jury is among the most important of all fundamental constitutional rights. It is "the only [right] to appear in both the body of the Constitution and the Bill of Rights—it is operating upon the spinal column of

American democracy." *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., dissenting); *compare* U.S. Const. amend. VI *with* U.S. Const. art. III, § 2. There is an "inseparable connection between the existence of liberty and the trial by jury." FEDERALIST NO. 83 (Hamilton). And the absolute language of the Sixth Amendment makes the right to a jury trial one of the few, if not the only, absolute rights. *See* U.S. Const. amend. VI ("In *all* criminal prosecutions..." (emphasis added)). By the Sixth Amendment's terms, a government cannot force a person to waive their right to a jury trial. Any person charged with an offense who asks for one, must receive one. Of course, most do not. *Frye*, 566 U.S. at 144 ("plea bargaining...is not some adjunct to the criminal justice system; it *is* the criminal justice system" (emphasis in original)).

Under the state's interpretation of the Statute, any person who is arrested for any crime while on bond for any other crime cannot be credited for any time they spent in pre-trial detention, regardless of whether the person was guilty of either crime. Bringing criminal cases to trial is decidedly not an expedient process. People arrested for any crime have an absolute right to a trial by jury. But if a condition of exercising that right is spending months or years in pre-trial detention on "dead time," meaning time they will never be credited for, then many people will forego the right entirely. The state cannot constitutionally force this result.

An instructive example is *United States v. Jackson*, 390 U.S. 570 (1968), which involved a challenge to the Federal Kidnapping Act. That act provided that the potential punishment for kidnapping was death, but only when sentenced by a jury. *Id.* at 571. Therefore, there was no procedure in place to sentence someone to death who had pleaded guilty. *Id.* The Supreme Court held this provision unconstitutional. *Id.* According to the Court, the "inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to

plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." *Id.* at 581 (footnote omitted). Therefore, even though the death penalty is a constitutional punishment for the crime, and the process in which it was imposed was constitutional, the Court invalidated the death penalty provision because it unnecessarily chilled the exercise of fundamental rights. *Id.* at 591.

Here, the Statute would have the same effect. Those arrested for a subsequent offense are forced to choose between their rights and their liberty. This statutory regime has the result of forcing those who choose to exercise the absolute right to a jury trial to serve longer terms of incarceration. Forcing this choice in this way is no better than if the General Assembly, in pursuance of the same objectives, passed a law denying a jury trial to any person arrested for a subsequent offense while on bond. The state cannot indirectly force a decision which it could not constitutionally compel. *Speiser*, 357 U.S. at 526. And whatever can be said about the General Assembly's objectives, they cannot be pursued "by means that needlessly chill the exercise of basic constitutional rights." *Jackson*, 390 U.S. at 582.

Accordingly, the Statute, as interpreted by the state, facially violates the unconstitutional conditions doctrine.

***b. The Statute infringes upon substantive due process rights.***

The Due Process Clause of the United States Constitution provides, "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .." U.S. Const. amend. XIV, § 1. Similarly, the due process clause of the South Carolina Constitution provides that no person "shall . . . be deprived of life, liberty, or property without due process of law." S.C. Const. art. I, § 3. The clause provides both procedural and substantive protections. Procedural due process protects against the deprivation of a constitutionally protected interest

unless the government provides the person with, at minimum, "notice, an opportunity to be heard in a meaningful way, and judicial review." *State v. Binnarr*, 400 S.C. 156, 165, 733 S.E.2d 890, 895 (2012) (quoting *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008)). But due process "guarantees more than fair process," it also "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). The substantive component ensures that, regardless of the fairness of the procedures used, the government's reasons for depriving a person of a protected life, liberty, or property interest are not arbitrary and have, at a minimum, a rational relationship to a legitimate governmental purpose. *Planned Parenthood S. Atl. v. State*, 438 S.C. 188, 250, 882 S.E.2d 770, 803 (2023).

The first step in a substantive due process analysis is to determine what level of scrutiny should be applied, which depends on the nature of the rights infringed by the statute. *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 140, 568 S.E.2d 338, 346-47 (2002). A statute that infringes a fundamental right must satisfy strict scrutiny. *Id.* at 140-41, 568 S.E.2d at 347. Strict scrutiny requires a statute to be narrowly tailored to achieve a compelling state interest. *Id.*

An individual's personal liberty is a fundamental right. U.S. Const. amend. XIV ("No State shall . . . deprive any person of life, *liberty*, or property, without due process of law . . .." (emphasis added)). Therefore, because the Statute implicates a fundamental right—liberty itself—substantive due process demands that under strict scrutiny the Statute be narrowly tailored to achieve a compelling state interest. *See Tant v. South Carolina Dept. of Corr.*, 408 S.C. 334, 341, 759 S.E.2d 398, 401 (2014) (stating that "[t]here can be no doubt the length of an inmate's incarceration implicates a constitutional liberty interest."); *Binnarr*, 400 S.C. at

165, 733 S.E.2d at 895 (explaining that freedom from bodily restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental actions."); *see also Matter of Chapman*, 419 S.C. 172, 179 & n.5, 796 S.E.2d 843, 846 & n.5 (2017) (holding that, because civil commitment constitutes a significant deprivation of liberty for due process purposes, the Fourteenth Amendment and Article I, § 3 of the South Carolina Constitution require a right to assistance of counsel during Sexually Violent Predator Act proceedings).

The General Assembly does not expressly provide its purpose for restricting time-served credit based on commission of a subsequent offense while on bond, and subsection (3)'s denial is one of a few exceptions to the general rule that full credit for all time served prior to trial must be awarded. *See* S.C. Code Ann. § 24-13-40. While it may be inferred that the legislative purpose is to deter the commission of crimes while on bond,[13] the General Assembly provides neither preamble nor prefatory language to enshrine such intent. More importantly, the state has only two legitimate, lawful interests in pre-trial incarceration: holding those who pose a danger to society and ensuring the presence of the accused in court. *State v. Ellefson*, 266 S.C. 494, 500, 224 S.E.2d 666, 669 (1976) (citing *Boyle*, 342 U.S. at 1); Note, *Credit for Time Served Between Arrest and Sentencing*, 121 U. PENN. L. REV. 1148, 1154 (1973).

To continue, even assuming that the General Assembly had a compelling interest, the Statute is not narrowly tailored. To be narrowly tailored to a compelling government interest, the law must be "necessary" to achieve that interest. *See Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 207 (2023). Under the Statute, it does

[13] Henry McMaster, *Signing Statement*, H. 3532 (Bond Reform) (June 20, 2023) ("urgent need for the General Assembly to close the 'revolving door' for repeat offenders and career criminals").

not matter what crime the original bond was for, how long ago that bond was set, whether the defendant is even guilty of the first crime, the severity of the subsequent crime, or how long the defendant was required to remain in pre-trial detention before finally being brought to court. The denial of credit cannot be narrowly tailored when its effect is virtually random and fundamentally arbitrary.

An instructive example of how a law that interferes with liberty may be narrowly tailored is the Sexually Violent Predator Act, analyzed by the Supreme Court in *Luckabaugh*. The Court found that the SVP Act applied only to "a limited subclass of dangerous persons" who by reason of mental illness were "likely to commit a dangerous act." *Id.* at 144, 568 S.E.2d at 349. Importantly, the SVP Act would *not* be constitutional if it permitted the state to civilly commit *all* sexual offenders without any determination that they had some disorder preventing them from controlling their behavior. *Kansas v. Crane*, 534 U.S. 407, 412 (2002) ("We do not agree with the State . . . as it seeks to claim that the Constitution permits commitment of the type of dangerous offender . . . without any lack-of-control determination"). The SVP Act is narrowly tailored by adding this extra step. By contrast, the Statute at issue here applies uniformly to all.

Further, numerous less restrictive avenues are available for accomplishing the same interest of deterring crime by those out on bond. *Cf., United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 809 (2000) (striking down statute where there were plausible, less restrictive means of accomplishing the government's aims). For example, a new felony offense which may add consecutive prison time onto the sentences of those who commit certain crimes while already out on bond is a more narrowly tailored alternative provided by the General Assembly. *See* S.C. Code Ann. § 17-15-270 (creating felony offense for committing violent crime while under a bond order for a previous violent crime). Moreover, the state could pass a

law that makes bond more difficult to obtain or post if a person is re-arrested. *See id.* § 15(D) (defendant who is charged with a violent offense or felony involving firearm must post a full cash bond). Perhaps the state could impose more streamlined procedures for the state to attempt to revoke the bonds of subsequent arrestees. *Id.* §§ 55(B), 55(C) (doing that). Or it could rely on the wisdom of circuit court judges, who may well sentence defendants more harshly upon learning of subsequent arrests. In any event, these alternatives would accomplish the claimed goals without extending the length of Respondent's punishment in an arbitrary manner.

Importantly, because the Statute denies time-served credit to any person who is arrested for a second time, regardless of their offense, it "is not tied to the relative public safety risk presented . . . and is excessive with respect to the purpose for which it was enacted." *Cf., Powell v. Keel*, 433 S.C. 457, 467, 860 S.E.2d 344, 349 (2021) (quoting *State v. Letalien*, 985 A.2d 4, 30 (Me. 2009) (Silver, J., concurring)). The Statute, by containing no limitations for the type of subsequent offense that could trigger the loss of credit provision, and by containing no requirement (as the state tells it) that a person even be *convicted* of the "subsequent crime," is far too broad to be narrowly tailored. The Statute, as interpreted by the state, would permit a defendant who is arrested—not convicted—of a summary court level offense carrying a maximum sentence of thirty days' imprisonment to spend years longer in prison. Such a result can only be arbitrary in nature and is not conceivably related to the General Assembly's purported interests, much less "rationally" so. Thus, to the extent that the Statute was enacted to close the "revolving door of repeat offenders," *see Signing Statement, supra* n. 14, its goals are not furthered by denying time-served credit to every single defendant who is arrested twice.

Therefore, the state has not shown a compelling interest for denying time-served credit based on a subsequent offense while on bond and the Statute is not narrowly tailored. The result is an arbitrary restriction on an individual's liberty interest.

***c. The Statute violates Apprendi, its progeny, and the Sixth Amendment.***

The United States Supreme Court decided in *Apprendi* that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. "Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty." *United States v. Haymond*, 588 U.S. 634, 637 (2019). Moreover, the Fifth and Sixth Amendments, taken together, "ensure that the government must prove to a jury every criminal charge beyond a reasonable doubt, an ancient rule that has extended down centuries." *Id.* at 641 (citing *Apprendi*, 530 U.S. at 477) (alterations and internal quotation marks omitted). Thus, "[a] judge's authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct." *Id.* at 642. Because of this, the Supreme Court has articulated that "it remains the case today that a jury must find beyond a reasonable doubt every fact which the law makes essential to a punishment that a judge might later seek to impose." *Id.* (alterations and internal quotation marks omitted).

Crucially, the Supreme Court's holding in *Apprendi* has been repeatedly extended to apply whenever additional incarceration occurs due to a specific finding of fact, not just punishment past the statutory maximum. *See, e.g.*, *Blakely v. Washington*, 542 U.S. 296 (2004) (factor under statutory sentencing guideline scheme that fell under statutory maximum for crime); *United States v. Booker*, 543 U.S. 220 (2005) (factors under non-binding sentencing guidelines—no difference "whether one labels such facts 'sentencing factors' or 'elements' of

crimes."); *Cunningham v. California*, 549 U.S. 270 (2007) (determinate sentencing law authorized the judge, rather than the jury, to find facts of "circumstances in aggravation" which exposed the defendant to an elevated upper term sentence); *Alleyne v. United States*, 570 U.S. 99 (2013) (any fact that increases the mandatory minimum is an "element" that must be submitted to the jury); *Haymond*, 588 U.S. at 634 (statute requiring mandatory minimum upon parole revocation, for specific fact, violates *Apprendi* when not submitted to jury for beyond a reasonable doubt finding on that fact); *Erlinger v. United States*, 602 U.S. 821 (2024) (requiring a jury to determine beyond a reasonable doubt whether prior offenses were committed on separate occasions for Armed Career Criminal Act purposes).

The Statute at issue violates the Sixth Amendment and *Apprendi* by increasing the length of incarceration an individual may be subject to through the deprivation of time-served credit without submitting the crucial fact that triggers the increase to a jury for a finding of proof beyond a reasonable doubt. Moreover, the relevant inquiry is one of effect. The determination of what facts must be subject to a jury finding turns on the effect rather than the form, and specifically, whether "the required finding expose[s] the defendant to a greater punishment." *Apprendi*, 530 U.S. at 494. To that end, the effect of the Statute is that it permits the judge to make a finding that is neither presented to a jury nor freely admitted by a defendant which increases the range of penalties that the defendant is ultimately exposed to. *See Erlinger*, 602 U.S. at 834 (explaining that "[v]irtually any fact that increases the prescribed range of penalties to which a criminal defendant is exposed must be resolved by a unanimous jury beyond a reasonable doubt or freely admitted in a guilty plea.") (quotations and alterations omitted).

The state asks this Court to bypass jury-based reasonable doubt for a judicial preponderance of the evidence finding. BOA at 8-9; *Haymond*, 588 U.S. at 646 (citing *Ring v.*

*Arizona*, 536 U.S. 584, 602 (2002) (noting that "any increase in a defendant's authorized punishment contingent on the finding of a fact requires a jury and proof beyond a reasonable doubt no matter what the government chooses to call the exercise."); *see also Erlinger*, 602 U.S. at 834 ("Judges may not assume the jury's factfinding function for themselves, let alone purport to perform it using a mere preponderance-of-the-evidence standard."). The ultimate result is that judicial fact finding concerning the subsequent offense increases the length of an individual's incarceration, and "[t]here can be no doubt the length of an inmate's incarceration implicates a constitutional liberty interest." *Tant*, 408 S.C. at 341, 759 S.E.2d at 401. The state asks this Court to allow judges to increase the punishment an individual is exposed to, beyond any statutory penalty prescribed by the underlying offense, by an additional judicial fact finding of whether a subsequent crime was "committed," by only a preponderance of the evidence. *See Alleyne*, 570 U.S. at 103-04, 115-16. Such a request is contrary to *Apprendi* and its progeny.

In sum, because the effect of the Statute allows the length of an individual's incarceration to be increased only as a result of additional judicial fact finding, it violates *Apprendi*, its progeny, and the Sixth Amendment.[14]

[14] The question of severability is beyond the scope of Respondent's arguments here. However, if this Court finds that the Statute is unconstitutional, it will necessarily be required to address whether the challenged sections of the Bond Reform Act are severable from the remainder. Respondent concedes that the sections he challenges here are severable, because the time-served credit provision is only one of several different legislative actions taken by the General Assembly to further its goals. Therefore, the remainder of the Statute "is of such a character that it may fairly be presumed the legislature would have passed it independent of that which conflicts with the constitution." *Joytime Distributors and Amusement Co., Inc. v. State*, 338 S.C. 634, 648-49, 528 S.E.2d 647, 654 (1999).

## CONCLUSION

For the foregoing reasons, this Court should affirm the well-reasoned order of the plea court.

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ATTORNEYS FOR RESPONDENT

This 26th day of November, 2025.